80-1728

NO. _____

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IN THE SUPREME COURT OF THE UNITED STATES

October Term,1980

DR. JAMES A. YEOHAM,
VELMA YEOHAM, AND
DR. JAMES A. YEOHAM, A
PROFESSIONAL CORPORATION

Petitioners,

v.

UNITED STATES OF AMERICA,
AND OCTAVIO SALDANA, REVENUE
AGENT OF THE INTERNAL REVENUE
SERVICE

Respondents.

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

PETITION FOR CERTIORARI

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ATTORNEY FOR PETITIONER

QUESTION PRESENTED

DOES THE INTERNAL REVENUE SERVICE HAVE THE AUTHORITY UNDER §7602 TO ISSUE A SUMMONS TO GATHER DATA FROM TAXPAYERS FOR A §7601 TAXPAYERS' COMPLIANCE MEASUREMENT PROGRAM AUDIT?

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AFFIDAVIT OF SERVICE

STATE OF TEXAS)

COUNTY OF BRAZOS)

I, Omer Leon Crum, depose and state that I am counsel of record for Dr. James A. Yeoham, Velma Yeoham, and Dr. James A. Yeoham, A Professional Corporation, Petitioners herein. Pursuant to Rule 28, Rules of the Supreme Court, I served one copy of the following Petition for a Writ of Certiorari on each of the parties required to be served herein as follows:

On the United States of America, respondent herein, by mailing one copy in a duly addressed envelope with postage prepaid, certified mail, return receipt requested, to the Solicitor General, Department of Justice, Washington, D.C. 20530.

On the Internal Revenue Service, respondent herein, by mailing one copy in a duly addressed envelope with postage prepaid, certified mail, return receipt requested, to Carleton D. Powell, Assistant Attorney General, Tax Division, Depart-

ment of Justice, Washington,D.C. 20530.

On the Dallas regional branch of the Internal Revenue Service, respondent herein, by mailing one copy in a duly addressed envelope with postage prepaid, certified mail, return receipt requested, to Mr.Kenneth J. Mighell, United States Attorney, United States Federal Building, Room 16G28, 1100 Commerce Street, Dallas,Texas 75242.

On Octavio Saldana, Internal Revenue Agent, respondent herein, by mailing one copy in a duly addressed envelope with postage prepaid, certified mail, return receipt requested, to the Office of the District Director of the Internal Revenue Service, United States Federal Building, 1100 Commerce Street, Dallas, Texas 75242.

OMER LEON CRUM
P.O.Box 4404
Bryan,Texas 77805
(713) 846-9210

Subscribed and sworn to before me this _____ day of April,1981.

Subscribed and sworn to before me on this _____ day of April,1981.

My commission expires on _____.

_____
WANDA SHIPP, Notary Public, In and For Brazos County,Texas

(seal)

NO. _____

IN THE SUPREME COURT OF THE UNITED STATES
October Term,1980

DR. JAMES A. YEOHAM,
VELMA YEOHAM, AND
DR. JAMES A. YEOHAM, A
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UNITED STATES OF AMERICA,
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Respondents.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Dr. James A. Yecham, Velma Yeoham,and Dr. James A. Yeoham, A Professional Corpora-

tion, Petitioners herein, pray that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit, entered in the above case on January 26,1981.

OPINIONS BELOW

The opinion of the United States District Court for the Northern District of Texas, Dallas Division, rendered April 11,1979, is repcrted at 468 F.Supp. 415 and is printed in Appendix A hereto, infra, Page A-1. The opinion of the United States Court of Appeals for the Fifth Circuit, rendered on January 26, 1981, is reported at 635 F2d 391 and is printed in Appendix B hereto, infra, Page B-1.

JURISDICTION

On March 26,1981, the United States District Court for the Northern District of Texas, in response to the above mandate from the Fifth Circuit Court of Appeals, issued a judgment enforcing an Internal Revenue Service summons of Petitioners' bank records.(Said

judgment is printed in Appendix C, infra, page C-1). On March 31, 1981, the District Court stayed its order enforcing judgment, for a period of twenty days, to allow Petitioners to file for a writ of certiorari with this honorable Supreme Court. The jurisdiction of the United States Supreme Court is invoked under the dictates of Title 28, Sections 1254(1) and 2101(c) of the United States Code.

STATUTES INVOLVED

The statutes which serve as the basis for this cause of action are located in Title 26, United States Code, and read as follows:

"Section 7601. Canvess of Districts for Taxable Persons and Objects.

a. General Rule.-- The Secretary shall, to the extent he deems it practicable, cause officers or employees of the Treasury Department to proceed, from time to time, through each internal revenue district and inquire after and concerning all persons therein who

may be liable to pay any internal revenue tax, and all persons owning or having the care and management of any objects with respect to which any tax is imposed.

b. Penalties. -- For penalties applicable to forcible obstruction or hindrance of Treasury officers or employees in the performance of their duties, see section 7212."

"Section 7602. Examination of Books and Witnesses.

For the purpose of ascertaining the correctness of any return, making a return where none has been made, determining the liability of any person for any internal revenue tax or the liability at law or in equity of any transferee or fiduciary of any person in respect of any internal revenue tax, or collecting any such liability, the Secretary is authorized --

(1) To examine any books, papers, records, or other data which may be relevant or material to such inquiry.

(2) To summon the person liable for

tax or required to perform the act, or any officer or employee of such person, or any person having possession, custody or care of books or account containing entries relating to the business of the person liable for tax or required to perform the act, or any other person the Secretary may deem proper, to appear before the Secretary at a time and place named in the summons and to produce such books, papers, records, or other data, and to give such testimony, under oath, as may be relevant or material to such inquiry; and

(3) To take such testimony of the person concerned, under oath, as may be relevant or material to such inquiry."

STATEMENT OF THE CASE

The United States Government and its Internal Revenue Service Officer, Octavio Saldana, brought this action on January 18, 1979, in the United States District Court for the Northern District of Texas, against

three respondent banks, seeking an order which would enforce four Internal Revenue Service summonses previously issued to the Respondents. The United States District Court had federal jurisdiction over this matter under Title 26, §7604 (a) [Enforcement of Summons] of the United States Code. Petitioners intervened in the proceedings through Title 26, §7609(b) of the United States Code.

On March 29, 1979, a show-cause hearing was held before Judge William M. Taylor, Jr.. The District Court denied enforcement of the summonses on April 6, 1979. The United States timely filed its notice of appeal to the Fifth Circuit.

On January 26, 1981, the United States Court of Appeals for the Fifth Circuit reversed and remanded the case, ordering the District Court to enforce the summonses. On March 26, 1981, Judge Taylor ordered enforcement of the summonses. On March 31, 1981, Judge Taylor granted a stay of the enforcement order for twenty days to allow Petitioners

time to file a petition for writ of certiorari with the United States Supreme Court.

The relevant facts, which are undisputed, may be summarized as follows:

The primary reason that Petitioners were selected for audit by the Internal Revenue Service was for the research purposes of the Taxpayers Compliance Measurement Program (TCMP). The institutional posture of the Service was proven by evidence introduced by the Petitioners in the form of two IRS Publications, Numbers 742 and 556, which stated that a recipient of a TCMP audit notice has been selected for the audit to provide data to be used as part of a government research program.

Revenue Agent Saldana testified that the Petitioners' returns did not contain any evidence of mathematical or procedural errors, and that there was no suspicion by the Service of fraud or wrongdoing on the part of the Petitioners.

REASONS FOR GRANTING WRIT

I.

The United States District Court for the Northern District of Texas correctly held that the Internal Revenue Service was not conducting an investigation of the Petitioners' returns under any of the areas outlined in Section 7602 of the Internal Revenue Code(supra) but was involved in gathering information to be used in its TCMP research project. Therefore no subpoena power to enforce such an examination lies under this section.

Under the purported authority of Section 7601 of the Internal Revenue Code (contained above), the Service has devised a program known as the Taxpayer Compliance Measurement Program. The official purpose of the TCMP is set forth in Part IV, Paragraph 4861(1) and (2) of III Audit C.C.H. Internal Revenue Manual:

"Background:

(1) The Service requires an accurate measure of its workload and its major char-

acteristics to effectively plan long-range programs for enforcement of the Federal tax system. The Taxpayer Compliance Measurement Program(TCMP) is the Service's long-range research program designed to provide measurements of total workload and its major characteristics so that alternative applications of its limited resources can be evaluated. IRM 125(18)4:(2) places responsibility for timely completion and quality control of this program upon appropriate regional and district officials.

(2) TCMP can be described as a scientific research system for measurement and evaluation of taxpayer compliance characteristics. The major uses of TCMP data are to measure the levels of compliance and tax administration gaps necessary for formulation of the Service's long-term enforcement policies; to determine changes in compliance levels over a period of time to properly direct enforcement programs; to develop and improve return selection procedures(Discriminant Function); to improve the effectiveness of enforcement operations; to

identify alternative methods of operation; and to achieve greater operating economies."

II.

Petitioners introduced into evidence at the hearing before the District Court, IRS Publications Numbers 742(Rev. 7-74) and 556 (Rev. Oct.,1975). The first two paragraphs of Publication 742 state to the taxpayer that:

"Your income tax return has been selected on a random basis for audit. Random selection of returns for audit is a normal part of tax administration and does not imply that anything is wrong.

Most returns are selected for audit by computer methods that identify returns with a high probability of error. However, in addition to computer selection methods and to insure their reliability, the Service makes detailed audits of many returns selected by chance. Your return is one of these."

The first paragraph of Publication 556 states:

"Why Returns are Selected for Examination:

The usual reason for selecting a tax return for examination is to verify the correctness of income, exemptions, or deductions that have been reported on the returns. However, some returns are selected as part of a random sample for research studies."

Both of the above publications were sent to Petitioners by the Internal Revenue Service. There can be no doubt that the sole purpose for examining the returns of the Petitioners in this case was to satisfy a research project. These publications are the Internal Revenue Service speaking officially as an institution. The testimony of an individual revenue agent that there might have been some examination to verify return correctness, can not change nor contradict these official government pamphlets, printed by the Government Printing Office, for distribution by the IRS.

In United States v. LaSalle National Bank,437 US 298, 57 L Ed 2d 221(1978), the Court held that:

"The institutional responsibility of

the Service to calculate and to collect civil fraud penalties and fraudulently reported or unreported taxes is not necessarily overturned by a single agent who attempts to build a criminal case...As in Donaldson, then where we refused to draw the line between permissible civil and impermissible criminal purposes at the entrance of the special agent into the investigation,[Citation omitted] we cannot draw it on the basis of the agent's personal intent. To do so would unnessarily frustrate the enforcement of the tax laws by restricting the use of the summons according to the motivation of a single agent without regard to the enforcement policy of the Service as an institution. Furthermore, the inquiry into the criminal enforcement objectives of the agent would delay summons enforcement proceedings while parties clash over, and judges grapple with, the thought processes of each investigator. See United States v. Morgan Guaranty Trust Co.,[Citation omitted]. This obviously is undesirable and

unrewarding. As a result, the question whether an investigation has solely criminal purposes must be answered only by examination of the institutional posture of the IRS."

The District Court found that the evidence in this case clearly establishes the fact that the IRS as an institution is engaged in research with TCMP audits. That fact cannot be changed by the motives of a single agent.

The question then becomes whether or not research projects under the TCMP as conducted by the Service, can be enforced with the use of summonses issued by a revenue agent under §7602.

In LaSalle National Bank, supra, footnote 18, the U.S. Supreme Court states that:

"[I]n §7602, Congress has bestowed upon the Service the authority to summon production for four purposes only: for 'ascertaining the correctness of any return, making a return where none has been made, determining the liability of any person for any internal

revenue tax...or collecting any such liability.' Congress therefore intended the summons authority to be used to aid the determination and collection of taxes. These purposes do not include the goal of filing criminal charges against citizens."

Research is not one of the four purposes described by §7602 or in LaSalle. It follows then that the IRS is without authority to issue summonses in TCMP audits.

The Court further found in footnote 18, of LaSalle, supra, that :

"The error of the dissent[which follows] is that it seeks a limit on the face of the statute when it should seek an affirmative grant of summons authority..."

Petitioners take the position that the same rationale applies in the case of research projects. Had Congress intended that the Service have the power to conscript citizens into its research projects, it would have specifically provided for them when it drafted §7602. See United States v. Levy, 533 F2d 969

at 974-975(CA5,1976).

In United States v. Humble Oil & Refining Company, 488 F2d 953(CA5,1974), the Fifth Circuit Court of Appeals stated:

"Section 7602 simply cannot be read to give the Internal Revenue Service an unrestricted license to enlist the aid of citizens in its data gathering projects. A contrary conclusion would eviscerate judicial constraints upon the summons power and raise serious constitutional questions....An adjustment of tax liabilities may have incidently resulted from the project, but the primary purpose of the project was to force private citizens to do its research."

In United States v. Flagg, 634 F2d 1087 (CA8,1980), the Eighth Circuit Court of Appeals(and in this case below)the Fifth Circuit(in following the Flagg decision) both courts have held that the IRS may issue summonses to taxpayers to gather data for its research projects -- specifically the TCMP. By these holdings, the Eighth and Fifth

Circuit Courts have given the IRS an "unrestricted license to enlist the aid of citizens in its data gathering projects" which is outside the bounds of Sections 7601 and 7602, and contrary to the holding in Humble Oil.

The holdings of the Flagg and First National Bank of Dallas cases also run afoul of the concurring opinion of Mr. Justice Blackman, with Mr. Justice Powell joining, in United States v. Bisceglia, 420 US 141, 43 L Ed 2d 88(1975), in which he said:

"The summons, in short, was issued pursuant to a genuine investigation. The Service was not engaged in researching some general problem; its mission was not exploratory. The distinction between an investigative and a more general exploratory purpose has been stressed appropriately by federal courts, see e.g., United States v. Humble Oil & Refining Company[Citation omitted]."

The mission of the Service in this case was clearly exploratory and not investigatory.

Therefore, it becomes clear that the IRS is empowered to use its summons power only in cases clearly involving investigations of taxpayers, not in furtherance of its research projects. United States v. Cooper & Lybrand, 550 F2d 615(CA 10,1977).

Magistrate Ronald Longstaff's conclusion in United States v. Flagg, No. 79-115-2 (unreported) in the United States District Court for the Southern District of Iowa in 1979, grasps the true meaning of the TCMP audit:

"The TCMP is a research program. Summons power could easily rise to an awesome intrusion upon private rights wholly apart from any basic needs of government taxation if it were extended to whatever project the Internal Revenue Service might deem interesting. Such an extension of summons power would be oppressive, and is not authorized by law."

III.

On appeal, the Fifth Circuit Court of Appeals found in this case that the IRS has the statutory power under 26 U.S.C. §7602 to issue summonses in a TCMP audit, where one good faith purpose is to ascertain the correctness of specific tax returns of named taxpayers. United States v. First National Bank, et al, 635 F2d 391(CA5,1981). In its holding the Fifth Circuit distinguished the District Court's reliance upon Humble Oil.

The Court stated that the Humble Oil decision does not stand for the broad proposition that the IRS is not allowed by law to examine returns for the purpose of carrying on research. The Court then declared that the First National Bank case differed from Humble Oil on the basis that, in the latter, no particular taxpayer was being investigated, whereas in the former, a particular taxpayer was being investigated.

In a similar case, the Eighth Circuit has recently in United States v. Flagg,

634 F2d 1087(CA8,1980), held that the IRS has the statutory power under §7602 to issue summonses in a TCMP audit, where one good faith purpose is to ascertain the correctness of specific tax returns.(Petition for writ of certiorari was filed in this case by the Respondent in the United States Supreme Court on February 11,1981, Cause No. 80-1359)

The error committed by both the Fifth and Eighth Circuits in applying the so-called "dual-purpose" theory of the LaSalle case to the facts of the Flagg and First National Bank cases, is that at the inception of the audit there was no dual purpose. The TCMP is a research program and the action of verifying the correctness of the returns examined in these cases was only an afterthought.

Circuit Judge O'Brien in the Flagg case considered the "dual purpose" argument, and in his order denying enforcement of the IRS summons, states:

"While the sole purpose of ever looking

at this taxpayer's return was the TCMP program, that after the choice was made, the person examining had a new purpose, to see if that return was correct. This is not the same as a dual purpose at the inception of the issuance as contemplated by LaSalle." Therefore, the "dual-purpose" doctrine is not applicable to TCMP audits.

The Fifth Circuit in its opinion in the instant case refers to United States v. Carter,489 F2d 413(CA5,1973) as support for its holding that an Internal Revenue Service summons can be used for research purposes. In Carter, the Fifth Circuit affirmed enforcement of an Internal Revenue Service summons requiring a tax preparer to provide the IRS with the names of all taxpayers whose returns he had prepared. Judge Taylor considered this argument at the trial level in the instant case,[United States v. First National Bank in Dallas, 468 F Supp. 415 at 416(N.D.Tex, 1979)]and stated:

"In Carter, a tax preparer had improperly

completed a test return. Because of this, the Internal Revenue Service wished to learn whose returns he had prepared so that they could be checked. This is analogous to Bisceglia in that the Internal Revenue Service had a reason to believe that certain returns were incorrect. Moreover, this was part and parcel of a program which had as its basis the upgrading of tax preparer prepared returns. It was not a research project with a goal of determining if tax preparers were actually preparing returns but an investigation as to competency of individual tax preparers and the returns that they had prepared."

United States v. Carter, then does not lend support to the Fifth Circuit Court's holding that an Internal Revenue Service summons is enforceable under Section 7602 for research purposes under the TCMP program.

IV.

In United States v. Coopers & Lybrand,

550 F.2d 615 (CA 10, 1977), the court held

"Because a proceeding to enforce a summons is an adversary proceeding controlled by the Federal Rules of Civil Procedure [Citation omitted], a district court's determination that a summons should not issue must stand unless determined to be clearly erroneous, [Citation omitted]."

The Respondents in this case have failed to show that the District Court's determination that a summons should not be issued is clearly erroneous; therefore, Judge Taylor's original denial of an enforcement of summons should stand.

CONCLUSION

For the foregoing reasons Petitioners respectfully request that the Court grant this Petition for Writ of Certiorari.

Respectfully submitted,

OMER LEON CRUM
ATTORNEY FOR PETITIONERS

APPENDIX A

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1980

No._____

DR. JAMES A. YEOHAM, VELMA YEOHAM, AND DR. JAMES A. YEOHAM, A PROFESSIONAL CORPORATION

PETITIONERS

vs.

UNITED STATES OF AMERICA AND OCTAVIO SALDANA, REVENUE AGENT OF THE INTERNAL REVENUE SERVICE

RESPONDENTS

ON WRIT OF CERTIORARI

TO THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

LEON CRUM
P.O. BOX 4404
BRYAN, TEXAS 77805
(713) 846-9210

ATTORNEY FOR PETITIONER

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

UNITED STATES OF AMERICA AND OCTAVIO SALDANA	)	FILED APRIL 6, 1979
v.	)	CIVIL NO. C 3-79-0060-C
FIRST NATIONAL BANK IN DALLAS, BANK OF THE SOUTHWEST, AND TRINITY NATIONAL BANK.	)	MEMORANDUM OPINION

WILLIAM M. TAYLOR, Jr., DISTRICT JUDGE

This is an action under sections 7402(b) and 7604(a) of the Internal Revenue Code of 1954. Petitioners have asked this Court to enter an order enforcing summons issued to the Respondents seeking access to records pertaining to the accounts of Dr. James A. Yeoham, Ms. Velma Yeoham, his wife, their children Paul, Loraine and James, and Dr. James A. Yeoham, a Professional Corporation, at the Respondent Banks.

Dr. Yeoham, Ms. Yeoham and the Corporation have stayed the summons and intervened in this proceeding in order to protect themselves from

what they contend is an illegal intrusion in-their financial affairs.

Mr. Charles C. Mitchell, a Revenue Agent of the Internal Revenue Service, testified at the hearing conducted in this proceeding that he was the agent who initially started the examination of Dr. Yeoham's income tax return for the year 1976. His pertinent testimony was that Dr. Yeoham's return was being examined under a Taxpayer Compliance Measurement Program Audit.

To the best of his knowledge, this is a program where a computer model set up for the purpose of gauging when a particular return should be exaimined is tested to insure its accuracy. Of secondary importance is the checking of the correctness of the return which has been randomly selected by the computer. But, primarily, the purpose of the program is to determine the accuracy of the model.

Mr. Mitchell, before he was transferred to other duties, partially examined Dr. Yeoham's financial records along with Ms. Yeoham's and

the Corporation's. But he did not see all of them. He had to look at Ms. Yeoham's because Dr. and Ms. Yeoham had filed a joint return. The corporation's records were voluntarily produced.

The next agent to do any meaningful examination was Petitioner Octavio Saldana. Mr. Saldana attempted to see further records but was denied permission to do so. Ultimately he issued the summons in question to the Respondents.

Upon notification by the banks, as required by law, Intervenors stayed the summons, causing this civil action to be filed.[1]

There is no dispute as to jurisdiction and the Court after a review of the pleadings and testimony concludes that it does have jurisdiction.

Intervenors have complained that the Internal Revenue Service is not allowed by law to examine returns for the purpose of carrying on

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1. §7609 of the Internal Revenue Code of 1954.

research. This contention is fully supported by the case of United States v. Humble Oil & Refining Company, 488 F.2d 953 (5 Cit., 1974); 421 U.S. 943, 95 S.Ct. 1670, 44 L.Ed.2d 97 (1975); on remand, 518 F.2d 747(1975).

The summons that the IRS had issued in Humble was for the purpose of checking into compliance with certain Internal Revenue Code provisions that dealt with potentially large tax advantages. Humble was summoned to produce its records as to whom it had surrendered mineral leases in 1970. The surrender of mineral leases can trigger tax disadvantages to the mineral lessors which raises the potential for tax abuse.

The IRS had no reason to believe that any of these lessors had failed to properly make their returns. The IRS, also, had not instituted any program to make an industry-wide examination as to the compliance with the applicable code sections.

On these facts, the Fifth Circuit held that the IRS was wanting to conduct research,

not an investigation. That Court then concluded that §7602 of the Internal Revenue Code of 1954 only allowed investigations into the correctness of returns; but, that it did not allow research into compliance with code provisions.

This decision was appealed to the Supreme Court which vacated and remanded for reconsideration in light of United States v. Bisceglia, 420 U.S. 141, 95 S.Ct. 915, 43 L. Ed. 2d 88(1975).

The Fifth Circuit, on remand, distinguished Bisceglia as being an investigation. That even though the IRS did not know who might have not paid their taxes in Bisceglia, there was a strong suspicion in that case that someone in particular had not, a material difference in the eyes of the Fifth Circuit. So the Court reaffirmed its prior holding.

The opinion on rehearing in the case of United States v. Carter , 489 F.2d 413 (5th Cir., 1973), reh. den. 504 F.2d 428(1974),

does muddy the waters, at least on the surface. But a reading of the two opinions show a different situation from the one in Humble. In Carter, a tax preparer had improperly completed a "test" return. Because of this, the IRS wished to learn whose returns he had prepared so that they could be checked. This is analogous to Bisceglia in that the IRS had a reason to believe that certain returns were incorrect. Moreover, this was part and parcel of a program which had as its basis the upgrading of a tax preparer prepared returns. It was not a research project with a goal of determining if tax preparers were accurately preparing returns but an investigation as to the competency of individual tax preparers and the returns that they had prepared.

As Dr. Yeoham's return was selected primarily for research purposes, this Court is compelled to conclude that Humble is controlling and the petition for enforcement should and will be denied. Intervenor's

attorney is requested to prepare and submit an appropriate order.

APPENDIX B

IN THE SUPREME COURT OF THE UNITED STATES

October Term 1980

No. _____

DR. JAMES A. YEOHAM, VELMA YEOHAM, AND DR. JAMES A. YEOHAM, A PROFESSIONAL CORPORATION

PETITIONERS

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UNITED STATES OF AMERICA AND OCTAVIO SALDANA, REVENUE AGENT OF THE INTERNAL REVENUE SERVICE

RESPONDENTS

ON WRIT OF CERTIORARI

TO THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

LEON CRUM
P. O. Box 4404
Bryan, Texas 77805
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Attorney for Petitioner

UNITED STATES of America and
Octavio Saldana, Plaintiffs,

United States of America,
Plaintiff-Appellant,

v.

FIRST NATIONAL BANK OF DALLAS
and Bank of the Southwest,
Defendants-Appellees,

Dr. James A. Yeoham, etc. et. al.,
Intervenors-Appellees.

No. 79-2420.

United States Court of Appeals,
Fifth Circuit.
Unit A

Jan. 26, 1981.

Before INGRAHAM, GEE and TATE, Circuit Judges.

TATE, Circuit Judge:

The United States (Internal Revenue Service) appeals from a decision of the district court which denied enforcement of four Internal Revenue Service (IRS) summonses issued to three banks. 468 F.Supp. 415 (N.D.Tex.1979). The stated purpose of these summonses, sought under sections 7402(b) and 7604(a) of the Internal

Revenue Code of 1954, was to facilitate an audit of the 1976 joint tax return of Dr. and Mrs. James A. Yeoham. However, as the evidentiary hearing showed, the return was selected for audit to develop data to be used for research in the Internal Revenue Service's Taxpayer Compliance Measurement Program (TCMP). Because we find that the IRS has the statutory power under 26 U.S.C. § 7602 to issue summonses where one good faith purpose is to ascertain the correctness of specific tax returns, we reverse the decision of the district court. (In rejecting identical contentions by taxpayers, the Eighth Circuit has recently reached the same conclusion as we do. United States v. Flagg, ____F.2d _____, (8th Cir., No. 80-1018, November 13, 1980).)

Context Facts

The IRS selected the Yeohams' 1976 tax return for audit pursuant to the Taxpayer Compliance Measurement Program, which is a research program primarily designed to measure accuracy

in filing federal tax returns. As an integral facet of this program, the taxpayers' return is scrutinized for potential errors. If the tax liability is ascertained to be either understated or overstated on the return, the respective collection or repayment is then undertaken.[1]

In conducting its investigation, the IRS issued four summonses to the three defendant banks for their records pertaining to the accounts of Dr. James A. Yeoham and Mrs. Velma Yeoham (taxpayers on joint return), their children, and Dr. James A. Yeoham, a Professional Association. In the opinion of the IRS agent conducting the audit, these records were needed to assure a thorough investigation.

Dr. Yeoham directed the three banks not to comply with the summonses, as is permissible under section 7609(b)(2) of the Internal Reve-

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1. Additionally, if the investigating agent believes that fraudulent entries were made on the tax return, it is then referred to the Criminal Investigation Division.

nue Code of 1954. The IRS thereafter, through its agent Saldana, instituted proceedings in district court to seek enforcement of the summonses.

The district court refused to enforce the summonses. It concluded that the IRS had exceeded its statutory authority by issuing summonses pursuant to a TCMP audit, an audit conducted "primarily for research purposes." In reaching its conclusion, the district court relied principally on this court's holding in United States v. Humble Oil & Refining Co., 488 F.2d 953 (5th Cir.,1974), vacated and remanded,421 U.S. 943, 95 S.Ct. 1670, 44 L.Ed. 2d 97(1975), aff'd. per curiam, 518 F.2d 747 (5th Cir.,1975). The district court found that Humble stood for the proposition "that the IRS is not allowed by law to examine returns for the purpose of carrying on research." 468 F. Supp. at 416. In denying the enforcement of the summonses, the district court opined: "As Dr. Yeoham's return was selected primarily for research purposes, this court is compelled to

conclude that Humble is controlling..." Id. at 417.

We disagree.

Before noting the reasons for the non-application of the Humble holding to the differing factual circumstances before us, we will briefly summarize (1) the statutory framework under which the IRS is allowed to audit taxpayers' returns and (2) the nature of the Taxpayer's Compliance Measurement Program.

Authority to Audit.

Section 7601(a) of the Internal Revenue Code of 1954 gives the IRS the authority to ascertain the tax liability of all persons who may be liable to pay any Internal Revenue tax. This section reads as follows:

> "The Secretary or his delegate shall, to the extent he deems it practicable, cause officers or employees of the Treasury Department to proceed, from time to time, through each internal revenue district and inquire after and concerning all

persons therein who may be liable to pay any internal revenue tax, and all persons owning or having the care and management of any objects with respect to which any tax is imposed."

Section 7602 gives the IRS a more specific grant of authority. By it, the IRS is empowered to examine records and witnesses (secured by summonses, if necessary) for the purpose of determining the correctness of returns and the liability of those who fail to make returns. In essence, section 7602 gives the IRS the necessary tools to effect the broad mandate of section 7601. Section 7602 reads as follows:

"For the purpose of ascertaining the correctness of any return, making a return where none has been made, determining the liability of any person for any internal revenue tax... or collecting any such liability, the Secretary or his delegate is authorized --

(1) To examine any books, papers, records, or other data which may be relevant

or material to such inquiry;

(2) To summon the person liable for tax or required to perform the act, or any person having possession, custody,or care of books of account containing entries relating to the business of the person liable for tax or required to perfrom the act, or any other person the Secretary or his delegate may deem proper, to appear before the Secretary or his delegate at a time and place named in the summons and to produce such books, papers, records, or other data, and to give such testimony, under oath, as may be relevant or material to such inquiry; and

(3) To take such testimony of the persons concerned, under oath, as may be relevant or material to such inquiry."(Italics ours.)

TAXPAYERS COMPLIANCE MEASUREMENT PROGRAM

The enforceability of an IRS summons pursuant to a TCMP audit was the subject of a recent opinion in United States v. Flagg, ___F.2d__

(8th Cir. No.80-1018, November 13, 1980). There the court gave the following description of the TCMP:

> "The Taxpayer Compliance Measurement Program is designed to measure and evaluate how taxpayers comply with the Internal Revenue Code reporting requirements. Under this program, a number of taxpayers are randomly selected by computer. The IRS then makes an extensive examination of these taxpayers' returns in order to ascertain the correctness of their returns. The examination are in-depth and more extensive than ordinary audits. The results of these audits, in addition to being used in the courts with normal IRS enforcement procedures (such as providing a refund for excess payments or assessing a deficiency for taxes due) are used as data for the TCMP research program, the purpose of which is to improve the overall efficiency of the administration of the income tax law.

The TCMP is a quality control program which attempts to pinpoint those areas of the tax law where errors will be most frequently made in filing a return. In order to implement the TCMP, an unbiased, random sample of the correctness of several thousand individual taxpayers' returns is needed to form the proper statistical data base. The IRS, by extensively auditing these returns, can predict which areas of the tax law millions of United States taxpayers may be having difficulty complying with. In so doing, the IRS can obviate the need to engage in costly, extensive examinations of taxpayers in areas of the tax law where the TCMP has shown that taxpayers encounter little difficulty. The TCMP thus aids the IRS in determining those areas of tax administration into which it should concentrate its limited enforcement resources. Both the taxpayers and the IRS gain from the effi-

ciencies resulting from the TCMP." Id. at___.

As in Flagg, the taxpayers do not challenge the authority of the IRS pursuant to section 7601 to establish the TCMP, nor could they. Id. at _____.

I.

The taxpayers contend(and the district court so held) that summonses should not be enforced when the IRS investigation is being conducted primarily for research purposes. Nevertheless, the district court implicitly recognized that the IRS may conduct research in its effort to effectuate the purposes of Sections 7601 and 7602. Indeed, this circuit had already recognized that research is a legitimate tool for the IRS to utilize in carrying out its broad mandate to both investigate and audit. United States v. Humble Oil & Refining Co.,supra; United States v. Carter, 489 F.2d 413(5th Cir.,1973), rehearing denied, 504 F.2d 428(5th Cir.,1974).[2]

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2. In Carter , this court was faced with an

As was stated earlier, the district court in the present case based its holding on this court's decision in United States v. Humble Oil & Refining Company, supra. There the IRS had issued a "John Doe" summons to Humble Oil & Refining Company directing it to produce records for 1970 pertaining to mineral leases surrendered during the year. The information sought by the IRS was needed for "research" in the local industry to measure tax compliance and then to take corrective action, if necessary. At the time the summons was issued to Humble, the IRS had not instigated an investigation of any of Humble's lessors.

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analogous situation to that before us now. There, the IRS had issued a summons pursuant to the Tax Preparers Project, a research program designed to check for fraudulent tax preparers.

In distinguishing Humble, the Carter court stated:

"In Humble Oil there was an investigation for the purpose of discovering criminal activity. In Carter there was research, not so much to unearth criminal activity on the part of the taxpayer or even the tax preparer, but more to protect the consumer and, incidently, to ensure that the United States received all of the funds it was

This court ruled that, while section 7601 granted the IRS wide latitude to make general inquiries concerning all taxpayers, including the type of research then in question, the IRS's authority to issue summonses under section 7602 was more limited. Absent an investigation of specific taxpayers, the IRS was found to lack the authority to issue summonses under section 7602.

The United States Supreme Court granted the IRS's petition for certiorari, vacated the judgment and remanded Humble for further consideration in light of United States v. Bisceglia,420 U.S. 141, 142, 95 S.Ct.915,917, 43 L.Ed.2d 88(1975). In Bisceglia, the Supreme Court found that "John Doe" summonses were permissible in aid of a particularized investigation,[3] carefully noting that the section 7602

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entitled to receive.
504 F.2d at 429.

3. The Supreme Court in Bisceglia was confronted with determining the enforceability of a "John Doe" summons issued by the IRS to a bank to discover the identity of a person who had deposited 400 deteriorated

summons power should not be used to conduct "fishing expeditions." 95 S.Ct. at 921.

On remand, this court distinguished the "John Doe" summons in Humble from that in Bisceglia, noting that the summons in Humble had not been issued to facilitate any ongoing, particularized investigation. 518 F.2d 748. Futhermore, this court concluded: "[T]he information [on the lessors] was sought from humble to expedite research on an IRS project concerning compliance with the lease restoration requirements of the Internal Revenue Service. An adjustment of tax liability may have incidentially resulted form the project, but the primary purpose of the project was research." 518 F.2d 748.

[1,2] In the instant case, the lower

$100 bills with the bank within the space of a few weeks. These transactions suggested the possibility of liability for unpaid taxes. The Court ruled that the summons was enforceable because it was issued to aid an ongoing investigation.

court apparently read the above statement in Humble to mean that the summons authority granted by section 7602 could not be used if the investigation was conducted primarily for research purposes[4] even though one of

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4. The district court's characterization of a TCMP audit as one being conducted "primarily for research purposes" is subject to question. It is unnecessary to categorize a multi-purpose summons into its primary purpose, secondary purpose, etc. If a multi-purpose summons is issued pursuant to a legitimate purpose under section 7602, it is enforceable.

The United States Supreme Court has already spoken to situations in which the IRS is conducting an audit with a dual purpose. In United States v. LaSalle National Bank, 437 U.S. 298, 98 S.Ct. 2357, 57 L.Ed.2d 221(1978), the Supreme Court enforced an IRS summons which had been issued for a dual purpose, i.e., both a civil and a criminal investigation. See, e.g., United States v. First National Bank of Atlanta, 628 F.2d 871 (5th Cir.,1980). The statutory grant of authority for issuance of this summons in LaSalle was found in section 7602, since one of the purposes of the summons was to ascertain the correctness of the tax return. The Supreme Court nevertheless made it quite clear that a section 7602 summons issued solely for a criminal investigation would be unenforceable. 98 S.Ct. at 2367, n.18.

It follows that a section 7602 summons issued for a dual purpose, one being to ascertain the correctness of the taxpayers'

the purposes of the investigation was to ascertain the tax liability of a particular taxpayer. The district court misinterpreted our decision in Humble. We hold, as we indicated in Humble[5], that information obtained pursuant to a summons issued under section 7602 may be used for research purposes if the summons is issued in aid of an investigation of the tax liabilities of a specific taxpayer or of an unknown taxpayer where there is an ongoing particularized investigation. See Note 3, supra.

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return(as expressly authorized by section 7602) and the other being to assemble research data from the present and other randomly drawn returns, should likewise be enforceable; even though the IRS might lack the statutory power to issue a section 7602 summons for the sole purpose of assembling research data, Humble Oil & Refining Company, supra.

5. "[W]e hold that the Internal Revenue Service is not empowered by section 7602 to issue a summons in aid of its section 7601 research projects or inquiries, absent an investigation of taxpayers or individuals and corporations from whom information is sought." Humble, 488 F.2d at 962-963(Italics ours).

The essence of the Humble holding, thus, was not that a summons could not be enforced where the investigation of a taxpayer's return was conducted primarily for research, but rather was that a particularized investigation (based on specific facts or specific taxpayers) was there non-existent. Contrasted to the facts before us, there is such an ongoing investigation that had been instigated by the IRS with at least one purpose being to ascertain the correctness of the defendant taxpayers' 1976 return, a purpose expressly authorized by section 7602.

Section 7602 should not be read so narrowly as to imply that an audit for a purpose authorized by it must be restricted solely to that purpose and may not be utilized as a good faith effort to obtain ancillary data. To do so would be to deny effect to the congressional intent of section 7601 ,i.e., to insure the general workability of the federal taxation system. Thus, the IRS may issue summonses for research

purposes as long as the summons is based in good faith upon a section 7602 purpose, even though motivated more generally by an investigative or research purpose within the contemplation of section 7601. See Flagg, supra.

II.

A section 7602 summons may be issued to gain data that will subsequently be used for research purposes, where the summons is also issued for a purpose authorized by the statute; but the summons must still be issued in good faith. United States v. Harris, 628 F.2d 875, 879(5th Cir.,1980). In United States v. Powell, 379 U.S. 48,85 S.Ct. 248,255, 13 L. Ed. 2d 112(1964), the Supreme Court announced several elements of a good faith exercise: "[The IRS] must show that the investigation will be conducted pursuant to a legitimate purpose, that the inquiry may be relevant to the purpose, that the information sought is not already within the [IRS's] possession, and that the administrative steps required by the Code have been followed..."85 S.Ct.

at 255.

Furthermore, the court in Powell proceeded to suggest what would constitute bad faith on the part of the IRS: "[A]n abuse would take place if the summons had been issued for an improper purpose, such as to harass the taxpayer or to put pressure on him to settle a collateral dispute, or for any other purpose reflecting on the good faith of theparticular investigation." 85 S.Ct.at 255. See, e.g. United States v. Harris, supra. The taxpayer in the instant case does not allege on appeal that the IRS acted in bad faith of this nature in issuing the summonses in conjunction with the TCMP.

Conclusion:

[3] The enforcement of the summonses was sought for a stated purpose of examining the correctness of the specified tax return of named taxpayers. Their issuance is thus expressly authorized by section 7602 of the Internal Revenue Code. The circumstance that the audit was motivated to obtain research

data, where the summonses are sought in good faith for a purpose authorized by section 7602, does not authorize the courts to deny their enforcement as thus issued within the statutory authority conferred upon the Internal Revenue Service by section 7602. Accordingly, we REVERSE and REMAND, with instructions to the district court to order enforcement of the summonses at issue.

REVERSED AND REMANDED.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

UNITED STATES OF AMERICA, and OCTAVIO SALDANA,	*	
Petitioners,	*	
v.	*	CIVIL ACTION NO. 3-79-0060-C
FIRST NATIONAL BANK IN DALLAS, BANK OF THE SOUTHWEST, and TRINITY NATIONAL BANK,	*	
Respondents,	*	
v.	*	
DR. JAMES A. YEOHAM; DR. JAMES A. YEOHAM, A PROFESSIONAL CORPORATION; and MS. VELMA YEOHAM,	*	
Intervenors.	*	

JUDGMENT

This cause having been tried before this Court on March 29,1979, and the Court having thereafter denied enforcement of the summonses herein, and the matter having been appealed to the United States Court of Appeals for the Fifth Circuit, and that Court having rendered

its opinion on January 26,1981, wherein this Court was directed to order enforcement of the summonses at issue, it is therefore

ORDERED, ADJUDGED and DECREED that the Respondents, First National Bank in Dallas, Bank of the Southwest, and Trinity National Bank, shall obey the summonses heretofore served upon them by the Petitioner, Octavio Saldana, Revenue Agent, and said summonses shall be obeyed in each and every requirement thereof. Further, the Respondents shall produce all of the books and records as required and called for by the terms of the summonses at such time and place as hereinafter may be fixed by the Petitioner, Octavio Saldana, or any other proper officer of the Internal Revenue Service, and the Respondents shall appear for the purpose of giving testimony concerning the tax liability of Dr. James A. Yeoham, a Professional Corporation, and James A. and Velma Yeoham for the year 1976, in accordance with said summonses.

It is further ORDERED, ADJUDGED, and DECREED that Dr. James A. Yeoham and Ms. Velma Yeoham, Intervenors, pay all costs of Court.

SIGNED this 26th day of March, 1981.

W.M. Taylor,Jr.
United States District Judge

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ALEXANDER L. STEVAS
CLERK

No. 80-1728

In the Supreme Court of the United States

OCTOBER TERM, 1980

JAMES A. YEOHAM, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

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Department of Justice
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v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

The question presented in this IRS summons enforcement case is whether the decision below correctly held that the Internal Revenue Service has the authority under Section 7602 of the Internal Revenue Code of 1954 (26 U.S.C.), to issue a summons in aid of an investigation of a particular taxpayer when, in addition to a determination of the correctness of the taxpayer's federal income tax return, the information obtained is also used for statistical purposes by the Internal Revenue Service to measure taxpayer compliance.

The pertinent facts may be summarized as follows: Petitioners' joint federal income tax return for 1976 was selected for audit under the Internal Revenue Service's Taxpayer Compliance Measurement Program (TCMP). The TCMP is designed to measure and evaluate how taxpayers comply with the Internal Revenue Code reporting requirements. Under this program, a number of taxpayers are randomly

selected and their tax returns are examined to ascertain the correctness of the returns and to determine the taxpayer's tax liability. In addition to use of the results of those audits in accordance with normal enforcement procedures, they are also used to improve the Internal Revenue Service's administration of the revenue laws and to identify statistically those returns which should be selected for audit. If an audit conducted under the TCMP indicates that the taxpayer has additional tax liability, appropriate procedures are instituted to collect the tax, or if the audit indicates an overpayment, refund is made, just as any other case (Pet. App. B-9 to B-10).

The summonsee here were issued to three banks to obtain business records relating to petitioners' income and expenses for 1976 (Pet. App. B-3 to B-4). Petitioners directed the banks not to comply with the summonses and intervened in the enforcement proceedings pursuant to Section 7609(b) of the Code. In this enforcement proceeding brought by the government and the IRS agent in the United States District Court for the Northern District of Texas, the district court denied enforcement of the summonses. It held that the Internal Revenue Service did not have the authority under Section 7602 to issue the summonses to aid in an investigation when the return was selected for audit in connection with the TCMP (Pet. App. A-2 to A-8).

The court of appeals reversed (Pet. App. B-1 to B-20). It ruled that the Internal Revenue Service has the statutory authority to issue a summons in aid of an investigation as long as one of the purposes for the investigation is authorized by Section 7602. Since one of the purposes for the investigation was to determine the correctness of petitioner's income tax liability, a purpose expressly authorized by Section 7602, the court concluded that the summonses must be enforced, even though the results of the investigation would also be used for other tax enforcement purposes.

1. The court of appeals correctly held that the summonses in this case were properly enforceable.

The Secretary of the Treasury and the Commissioner of Internal Revenue are charged with the responsibility of enforcing and administering the Internal Revenue Code. To this end, Section 7601 of the Code directs the Secretary to canvass and inquire after all persons who may be liable to pay any internal revenue tax. Section 7602 of the Code gives the Secretary the authority, consistent with the mandate in Section 7601, to issue a summons where necessary to ascertain the correctness of any return, to make a return where none has been filed, and to determine the internal revenue tax liability of any person. In *United States* v. *LaSalle National Bank*, 437 U.S. 298 (1978), this Court held that the Internal Revenue Service has the authority to issue a summons if one of the purposes for the investigation is authorized under Section 7602, even though the information obtained by the use of a summons may subsequently prove useful in a criminal investigation. See also *United States* v. *Euge*, 444 U.S. 707, 711 (1980). Here, it is clear that the summonses were issued to determine the correctness of petitioners' return. Only when the correctness of the return has been determined is the information obtained from the investigation useful in the Taxpayer Compliance Measurement Program (Pet. App. B-9 to B-10, B-19 to B-20). Accordingly, the court of appeals correctly ordered the summonses enforced. Indeed, this Court recently declined review in a case raising an identical challenge to the enforcement of an IRS summons. *United States* v. *Flagg*, 634 F. 2d 1087 (8th Cir. 1980), certiorari denied, No. 80-1359 (Apr. 20, 1981).

Furthermore, the random selection of returns under the Taxpayer Compliance Measurement Program does not exceed the Service's express authority to administer and enforce the Internal Revenue Code (Section 7801 of the

Code), and to inquire after all persons who may be liable to pay any internal revenue tax (Section 7601 of the Code). As the court of appeals noted (Pet. App. B-10 to B-11), in quoting with approval from *United States* v. *Flagg, supra,* 634 F. 2d at 1089, " '[t]he TCMP * * * aids the IRS in determining those areas of tax administration into which it should concentrate its limited enforcement resources. Both the taxpayers and the IRS gain from the efficiencies resulting from the TCMP.' " Accordingly, there is no evidence to show, or even any reason to suggest, that returns randomly selected under the Taxpayer Compliance Measurement Program are selected for any improper purpose.

2. Petitioners further suggest (Pet. 16-17) that the decision below cannot be reconciled with *United States* v. *Humble Oil & Refining Co.,* 488 F. 2d 953 (5th Cir. 1974), vacated and remanded, 421 U.S. 943, aff'd per curiam, 518 F. 2d 747 (1975). There the court declined to enforce an internal revenue summons to obtain information where "the primary purpose of the project was research" (518 F. 2d at 748) with respect to the level of taxpayer compliance with a particular Internal Revenue Service rule. See also *United States* v. *Bisceglia,* 420 U.S. 141, 151-152 (1975) (Blackmun, J., concurring). The court below expressly disavowed (Pet. App. B-11 to B-18) the interpretation of its previous holdings in *Humble Oil* advanced by petitioners in this case, holding "that information obtained pursuant to a summons issued under section 7602 may be used for research purposes if the summons is issued in aid of an investigation of the tax liabilities of a specific taxpayer * * *"* (Pet. App. B-16). See also *United States* v. *Flagg,*

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* *United States* v. *Bisceglia, supra,* does not suggest a different result. This Court there ordered enforcement of a "John Doe" summons when it was determined that the Internal Revenue Service was investigating a party to a commercial transaction whose identity was unknown.

supra; United States v. *Mercantile Trust Co.*, No. 80 Misc. 071 (E.D. Mo. Dec. 31, 1980) (summons issued to investigate a return selected for audit under the TCMP enforced); *United States* v. *Hallmark Carpet Mills*, CV 80-5474 MRP (TX) (C.D. Cal. Jan. 16, 1981), appeal pending, No. 81-5059 (9th Cir.) (same).

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.
Solicitor General

MAY 1981